Supreme Court, U.S.
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No. 04-98

IN THE

Supreme Court of the United States

SNAKE RIVER VALLEY ELECTRIC ASSOCIATION,
Petitioner,

v.

PACIFICORP
(INCLUDING UTAH POWER & LIGHT COMPANY, A DIVISION),
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF TO BRIEFS IN OPPOSITION BY RESPONDENTS PACIFICORP AND STATE OF IDAHO

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QUESTIONS PRESENTED

1. Whether, under *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the adjudication of the Sherman Act (15 U.S.C. § 1, *et seq.*) under the federal antitrust laws by the district court requires, as a condition precedent, the filing by the party seeking antitrust relief of an application for wheeling with the Federal Energy Regulatory Commission under the Federal Power Act.

2. Whether, under *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992), and *Patrick v. Burgett*, 586 U.S. 94, 101 (1988), the provisions of the Sherman Act of the federal antitrust laws are superseded under the state action immunity doctrine where the State has never held any hearing or made any adjudication to "exercise ultimate control over the challenged [private] anticompetitive conduct."

3. Whether, under *New York, et al. v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002) and *Public Utilities Com. v. Attleboro Steam & E. Co.*, 273 U.S. 83, 89-90 (1927), the state statute relied on by the courts below to provide antitrust immunity, the Idaho State Electric Supplier Stabilization Act of December 8, 2000, conflicted with the bright, clear line drawn by the Commerce Clause of the Constitution establishing that the states lack jurisdiction to adjudicate wheeling of wholesale power.

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Both the Respondent, PacifiCorp, and Intervenor, Attorney General of the State of Idaho, fail to address the major issues presented by Petitioner, Snake River Valley Electric Association ("Snake River" or "SRVEA") based on the decisions by the courts below, which directly conflict with and seriously undermine the long-established precedents of this Court:

(1) Governing the exclusive jurisdiction of the federal courts, not the Federal Energy Regulatory Commission ("FERC"), to adjudicate the application of the federal antitrust laws under *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973);

(2) Holding that the state has no authority to grant immunity from those federal antitrust laws under controlling decisions by this Court in *California Retail Liquor Dealers v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980), *Ticor Title Ins. Co.*, 504 U.S. 621 (1992), and *Patrick v. Burgett*, 486 U.S. 94 (1988), as well as the prior decision below by the Ninth Circuit in *Snake River I*, 238 F.3d 1189 (9th Cir. 2001), that no immunity from the federal antitrust laws exists based on the date of enactment of a new state law (the Amended ESSA[1] of December 8, 2000), where the Idaho Public Utility Commission has never determined under that new law whether Snake River's request for wheeling by PacifiCorp of wholesale power acquired by Snake River "results in retail wheeling and/or a sham wholesale transaction"; and

(3) Holding under long-established decisions in *Public Utilities Com. v. Attleboro Steam & E. Co.*, 273 U.S. 83, 89-90 (1927), *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964), and *New York, et al. v. Federal Energy Regulatory Commission, et al.*, 535 U.S. 1 (2002), that the states have no jurisdiction

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[1] Electric Supplier Stabilization Act, amended December 8, 2000, Idaho Code 61-332D.

over sales and transportation of wholesale power in interstate commerce.

The contentions by Respondent PacifiCorp and the Idaho Attorney General improperly seek to negate this Court's long-standing decisions construing the applicability of the federal antitrust laws *vis-à-vis* the Federal Power Act and the state immunity doctrine, and pose major issues regarding the future application of the federal antitrust laws.

I. PACIFICORP AND THE IDAHO ATTORNEY GENERAL PRESENT CONFLICTING VIEWS AS TO WHETHER SNAKE RIVER HAD TO FILE A REQUEST FOR WHEELING WITH THE FEDERAL ENERGY REGULATORY COMMISSION UNDER THE FEDERAL POWER ACT AS A CONDITION PRECEDENT TO ANY RELIEF UNDER THE FEDERAL ANTITRUST LAWS, CONTRARY TO THIS COURT'S LONG-ESTABLISHED DECISION IN *OTTER TAIL POWER CO. v. UNITED STATES.*

In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), this Court, in what has been regarded as a landmark decision, definitively rejected the contention by a utility (Otter Tail, comparable to PacifiCorp in the present case) that the Federal Power Act, 16 U.S.C. §824 *et seq.*, immunizes utilities from the federal antitrust laws with respect to refusal to wheel or sell power to a competitor. This Court held:

> ...Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations.

410 U.S. 374-375.

The Idaho Attorney General never addresses the contrary major legal premise underlying the decisions of the court

below denying Snake River any relief under the federal antitrust laws, but presents an argument that directly conflicts with the basic contention by PacifiCorp that any antitrust relief for Snake River is dependent upon Snake River's compliance with rules established by the FERC governing the transmission of wholesale power in interstate commerce. The State Attorney General contends that the Amended ESSA, enacted December 8, 2000, gives the state public utility commission the exclusive jurisdiction to determine whether a utility is required to provide wheeling over its system.[2] Since the Idaho Attorney General's argument that antitrust immunity for refusal to wheel by PacifiCorp was based solely on the enactment of the Amended ESSA—a position that gives the state public utility commission authority to determine if wheeling was required, and also is

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[2] The Amended ESSA provided as follows:

> Idaho Code 61-332D. WHEELING AND SERVICES.
>
> (1) An electric supplier shall not be required to provide wheeling service over its system if such service results in retail wheeling and/or an sham wholesale transaction.
>
> (2) An electric supplier declining to furnish electric service pursuant to this section shall petition the [State Public Utility] Commission for review of the electric supplier's action in respect to a request for such service. The Commission shall, upon notice and opportunity for a hearing, review the electric supplier's action for consistency with the purposes and provisions of this Act, and issue an order in accordance with its finding, ordering either that the wheeling service shall, or shall not, be required.

In the present case, PacifiCorp filed an application for summary judgment with the Idaho Public Utility Commission under this section to deny wheeling to Snake River. The Commission, in an order issued October 31, 2001, rejected PacifiCorp's motion for summary judgment and ordered a hearing. Subsequently, after the district court issued its order on February 7, 2002, ruling that "PacifiCorp had state action immunity for its actions after December 8, 2000, when the amendment to the ESSA took effect," Pet. App. 24a, the state commission took no further action on PacifiCorp's application under the Amended ESSA, and never ruled that PacifiCorp "shall not be required to provide wheeling service over its system."

diametrically opposed to the position of PacifiCorp that the issue was controlled by the FERC and its regulations—there is further strong support for this Court to grant certiorari over this important issue governing the application of the federal antitrust laws.

PacifiCorp itself never directly addresses the issue as to whether its claim, repeated throughout the trial, that Snake River's entitlement to wheeling under the federal antitrust laws was dependent on compliance with FERC regulations, is in conflict with this Court's holding in *Otter Tail*:

> Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations.
>
> 410 U.S. 374-375.

PacifiCorp's argument (Br. 10-13) that there was no antitrust violation because SRVEA was able to enter into a contract for lower-cost wholesale power with Idaho Power Company, and later, Enron Power Marketing, presents no answer to the controlling question in this case: whether PacifiCorp's refusal to wheel that power to Snake River over its transmission system violated the federal antitrust laws. Snake River was denied the use of this low-cost power solely because of PacifiCorp's consistent refusal since 1993 to wheel or sell power to Snake River. The conclusive evidence in the case demonstrated that PacifiCorp had monopoly control over the transmission required for the wheeling of that power to Snake River for resale to its members. The district court itself concluded that the antitrust issue was properly before the jury:

> That leaves the claim that PacifiCorp has refused to wheel power to Snake River. Dr. Wilson concludes that PacifiCorp has a monopoly in the transmission of power in Snake River's market territory of eastern Idaho...Dr.

> Wilson further concludes that "it is not economically feasible for [Snake River] to build alternative transmission lines to receive power from sources other than PacifiCorp, *id.* at p. 9, ¶23."

The jury confirmed Dr. Wilson's conclusions in its first two findings. Pet. App. 26a. Regarding Questions 1 and 2, the jury found that PacifiCorp's power lines, which served SRVEA's potential customers, were essential to effective competition in the market for electric power in that area of central Idaho, and that it was impractical or uneconomical for SRVEA to construct its own facilities to serve its potential customers. *See* Pet. at 5.

Thus, PacifiCorp's sole argument in its brief in opposition—that the *Otter Tail* ruling that the federal antitrust laws, not the Federal Power Act, govern a refusal to wheel because PacifiCorp does not have monopoly power—is simply clearly erroneous.

PacifiCorp's erroneous position reinforces the importance of this case to the future administration of the federal antitrust laws with respect to the federal district courts, the FERC, and the state public utility commissions.

II. THE COURTS BELOW ERRED IN RULING THAT THE AMENDED ESSA AUTOMATICALLY SUPERSEDED THE FEDERAL ANTITRUST LAWS, CONTRARY TO THIS COURT'S DECISIONS IN *MIDCAL*, *TICOR*, AND *BURGETT*, AS WELL AS THE NINTH CIRCUIT'S DECISION IN *SNAKE RIVER I*.

Both Respondent PacifiCorp and the Idaho Attorney General err in contending that the courts below properly granted immunity from the federal antitrust laws upon the enactment of the Amended ESSA on December 8, 2000, without any determination of PacifiCorp's application under that statute that the wheeling service sought by Snake River

would result in "retail wheeling and/or a sham wholesale transaction."[3] The Idaho Attorney General argues that:

> ...There is no precedent for the proposition that state action immunity only attaches after a State undertakes and finally resolves a specific matter entrusted to a specific governmental agency...

Brief in Opposition at 14. This contention is flatly contradicted not only by the three leading Supreme Court cases, but also by the Ninth Circuit decision in *Snake River I*, 238 F.3d 1189 (9th Cir. 2001).[4]

In *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992), the Court cited *Patrick v. Burgett* as follows:

> "The active supervision requirement stems from the recognition that where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interest, rather than the governmental interest of the State. ...The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenge to anticompetitive conduct. ...The mere presence of some state involvement or monitoring does not suffice. ...The active supervision prong of the *Midcal* test requires that state officials have and

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[3] The Amended ESSA, §61-332D, specifically provided:

> The Commission shall, upon notice and opportunity for a hearing, review the electric supplier's action for consistency with the purposes and provisions of this Act, and issue an order in accordance with its finding, *ordering either that the wheeling service shall, or shall not, be required.*

Emphasis added.

[4] This decision was final and thus should have been the controlling law of the case governing the remand proceedings in the courts below.

> exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy rather than merely the party's individual interests."
>
> * * *
>
> Because the particular anticompetitive conduct at issue in *Patrick* had not been supervised by government actors, we decided that the actions of the peer review committee were not entitled to state-action immunity.
>
> * * *
>
> Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices had been established as a product of deliberate State intervention, not simply by agreement among private parties.

In *California Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97 at 105, the Court held that the second prong of the test for antitrust immunity is not met where:

> The state neither establishes prices nor reviews the reasonableness of the price schedule; nor does it regulate the terms of fair trade contracts, the State does not monitor market conditions or engage in any "pointed reexamination" of the program. The national program in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.

The Ninth Circuit in *Snake River I*, 238 F.3d 1189 (9th Cir. 2001) held that PacifiCorp had no immunity under the Original ESSA because it did not meet the second prong of the *Midcal* test, which..."requires that the state 'exercise ultimate control over the challenged [private] anticompetitive conduct,' *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992)," 238 F.3d at 1193. The Ninth Circuit also held that

"this prong ensures that the 'state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies.' *Patrick v. Burgett*, 486 U.S. 94, 101...(1998)." The Ninth Circuit also rejected the district court's conclusion that active supervision by the state of other cases satisfies the test by distinguishing *Nugget Hydroelectric, L.P. v. Pacific Gas and Electric Co.*, 981 F.2d 429 (9th Cir. 1992), because:

> ...While *Nugget* does hold that an equivalent number of cases act as active supervision...*those cases all involved reviews of the specific conduct at issue in Nugget.* ...The mere presence of cases reviewing general violations of the ESSA does not amount to active supervision in this case.

238 F.3d at 1195; emphasis added.

Based on these precedents, it is clear that the courts below erred in directly conflicting with the controlling decisions by this Court in *Midcal*, *Ticor*, and *Burgett*, as confirmed by the Ninth Circuit itself in *Snake River I*, by holding that the mere enactment of the Amended ESSA on December 8, 2000 barred any antitrust relief to Snake River as of that date. The decision below severely undercuts the effectiveness of the federal antitrust laws by concluding that enactment of the Amended ESSA automatically, as of that date, granted antitrust immunity to PacifiCorp, absent any specific State review or ruling on the particular merits and issues of PacifiCorp's original claim that Snake River's request for wheeling constituted a sham wholesale transaction.[5]

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[5] PacifiCorp claims that its failure to pursue and obtain an order under §61-332D of the Amended ESSA to bar it from wheeling to Snake River can be overlooked by referring to another section, §61-332B, which it claims also applies retroactively to Snake River. This claim is patently fallacious. Snake River's members joined Snake River when the cooperative was established in 1993 and in the years before enactment of the statute. This issue has nationwide importance to the future of all municipals and electric cooperatives, because it would enable a state to

III. THE AMENDED ESSA CAN PROVIDE NO IMMUNITY FROM THE FEDERAL ANTITRUST LAWS BECAUSE THE STATE LACKS JURISDICTION TO ADJUDICATE WHEELING OF WHOLESALE POWER IN INTERSTATE COMMERCE.

The arguments on the merits by PacifiCorp and the Idaho Attorney General never address the clear, long line of cases by this Court holding that sales of electric power at wholesale for resale in interstate commerce are not subject to the jurisdiction of the States; starting with *Public Utilities Com. v. Attleboro Steam & E. Co.*, 273 U.S. 83, 89-90 (1927) under the Constitution, to *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964), holding that the Federal Power Act established "a bright line" between federal and state jurisdiction, to *New York, et al. v. Federal Energy Regulatory Commission, et al.*, 535 U.S. 1 (2002), affirming that any issue of "retail-turned-wholesale" or "sham wholesale transaction" falls exclusively within federal jurisdiction.

The issue was thoroughly briefed and argued in the district court and was also before the appeals court.

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require any cooperative or municipal to give up its long-held membership to a utility company.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below summarily reversed, or the case set for argument.

Respectfully submitted,

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